Neutral Citation Number: [2010] EWHC 3152 (QB)

Case No: 9AL02147

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
MERCANTILE COURT

Date: 1 December 2010

Before:

HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

(1) ANDREW HARRISON
(2) ELAINE HARRISON

Claimants

- and -

BLACK HORSE LIMITED

Defendant

Andrew Clark (instructed by McHale & Co. Solicitors) for the Claimants
Ruth Bala (instructed by SCM Solicitors) for the Defendant

Hearing date: 8 November 2010

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

INTRODUCTION

1. This is an appeal from the decision of District Judge Marston on 19 July 2010 whereby she dismissed the various claims brought by the Claimants, Mr and Mrs Harrison ("the Harrisons") against the Defendant, Black Horse Limited ("the Bank") arising out of the sale to them of payment protection insurance ("PPI") in respect of a loan taken out by them at the same time. Although the case was originally heard in the Worcester County Court, the appeal was transferred into the Mercantile Court in Manchester which has dealt with a number of PPI cases.

2. The basic facts are as follows: in July 2003 the Harrisons took out a loan from the Bank for £46,000 together with a single premium PPI policy which cost £11,500. As was common at the time, that premium was the subject of a separate loan which attracted its own monthly repayments of capital and interest alongside the main loan.

3. Then, by a further loan agreement made with the Bank on 24 July 2006, the Harrisons borrowed a further sum of £60,000 together with a further PPI policy at a cost of £10,200. Of the sum advanced, £54,815 was applied to discharge the previous loan and cancel its associated PPI. The balance of the 2006 loan went on household improvements and a holiday. The 2006 loan was to be repaid over a period of 23 years. The PPI associated with it would last for the first 5 years only, but was repayable by way of monthly instalments of capital and interest co-terminously with the main loan repayments. In the event, the 2006 loan was discharged by further re-financing on 2 March 2009. At the same time the PPI was cancelled. The total cost to the Harrisons of the PPI by the time of cancellation was £10,529.70.

4. The PPI was sold by the Bank to the Harrisons as agent for the actual insurer, Lloyds TSB General Insurance Limited ("Lloyds Insurance"). For the purpose of the Insurance Conduct of Business Rules then (but not now) in force ("ICOB") the Bank was an insurance intermediary acting on an advised basis but only in relation to the single product offered, namely this PPI provided by Lloyds Insurance.

5. The Bank earned a commission from Lloyds Insurance on the sale of the PPI in the sum of £8,887.49. This represents 87% of the premium paid by the Harrisons. It is common ground that the Bank did not disclose either the fact or amount of this commission to the Harrisons.

THE ISSUES

6. The Harrisons claimed the following against the Bank:

    (1) Damages for breach of statutory duty under s150 of the Financial Services and Markets Act 2000 and ICOB rules 4.3 and 2.3;

    (2) Damages for negligence;

    (3) A statutory remedy under s140B of the Consumer Credit Act 1974 on the basis that there was an unfair relationship between the parties within the meaning of s140A thereof.

7. I consider in relation to each of the those issues (a) whether the learned District Judge erred and (b) if so, what the consequences now are.

ALLEGED BREACH OF RULE 4.3 – UNSUITABLE PRODUCT

The Rules

8. It is common ground that by virtue of s150 of the 2000 Act the Bank was under a statutory duty to comply with the ICOB rules. Rule 4.3.1 sets out an over-arching duty as follows:

> "to take reasonable steps to ensure that any..personal recommendation to buy a non-investment insurance contract …is suitable for the customer's demands and needs at the time the ..recommendation is made.."

9. Rule 4.3.2 then sets out what information about the customer's demands and needs ("DAN") should be obtained by the Bank:

> "In assessing the customer's demands and needs, the insurance intermediary must:
>
> (1) seek such information about the customer's circumstances and objectives as might reasonably be expected to be relevant in enabling the insurer and its intermediary to identify the customer's requirements. This must include any facts that would affect the type of insurance recommended, such as any relevant existing insurance;
>
> (2) have regard to any relevant details about the customer that are readily available and accessible to the insurance intermediary, for example, in respect of other contracts of insurance on which the insurance intermediary has provided advice or information ..."

10. Having established the customer's DAN, rules 4.3.6 and 4.37 set out particular matters which must be taken into account by the Bank when assessing the suitability of the policy:

> "4.3.6
>
> In assessing whether a non-investment insurance contract is suitable to meet a customer's demands and needs, an insurance intermediary must take into account at least the following matters:
>
> (1) whether the level of cover is sufficient for the risks that the customer wishes to insure;
> (2) the cost of the contract, where this is relevant to the customers demands and needs ...
>
> 4.3.7 (1) where ICOB 4.3.6 R (2) applies an insurance intermediary should take into account the cost of the contract when compared to other non-investment insurance contracts that cover a similar range of demands and needs on which the insurance intermediary can provide advice or information ..."

The Facts

11. The salesperson who dealt with the Harrisons at the time, Lisa Hutcheson, followed a particular script which was mandatory for employees engaged in such sales. The District Judge found that the script was followed. The first part is set out at p247 of the trial bundle. It included telling the Harrisons that the Bank could only offer a product from Lloyds Insurance. She would then have said that she was going to take them through a questionnaire ("the Questionnaire").

12. The Questionnaire is at p 272. It includes a number of questions which were asked orally by Ms Hutcheson. On the basis of the answers given she recommended the policy. I refer to its terms below.

13. She then continued with the rest of the script by telling them that the PPI offered was suitable for them on a Joint Life basis which meant life cover for both, and illness and redundancy cover for Mr Harrison. The overall and separate prices for the main loan and PPI were then given and the Harrisons asked if the figures were acceptable. It is not suggested that they said that they were not and as the script was followed they must have said that they were.

14. The Harrisons were then presented with a typed version of the Questionnaire. This recorded the questions which had been asked. They include the following:

> " 3. Would you like your repayments to be paid for you whilst you are unable to work as a result of an accident or sickness for more than 45 consecutive days?
>
> 4. Would you like your repayments to be paid for you, whilst you are unemployed as a result of involuntary redundancy and remain so for more than 60 days?
>
> 7. Do you have any type of insurance that would specifically provide cover for the repayment of this agreement?"

15. Mr Harrison answered "yes" to questions 3 and 4 to which Mrs Harrison answered "no". Both answered "no" to question 7.

16. The Personal Recommendation set out after the questions reads as follows:

> " If you have answered "no" to question 7 above, this indicates that your demands and needs are those of a credit customer who wishes and needs to ensure that the repayments of your finance agreement are met now and for the first 5 years of the loan."

17. The terms of the policy were explained to the Harrisons and it is not suggested that they were unaware of any of its key features including the scale of benefits and its five-year length. The latter was clearly set out in a Key Facts document (p 273) seen by the Harrisons along with the full terms (p 274). The cost was clearly set out in the single loan agreement which encompassed the principal and interest terms for both the main loan and the PPI and the monthly payments to be made. See pp276 and 277. This showed that the PPI premium was £10,200 as against the loan of £60,000 with monthly repayments of £75.50 alongside the main loan repayments of £444.10. The Harrisons (or certainly Mr Harrison who was acting or speaking for his wife and himself) were aware of all of this before they signed.

18. Although the Harrisons said that they thought that the PPI was compulsory if they were to take the loan it was accepted that any such understanding was not caused by anything said or done by the Bank. Indeed, given that the script was followed, they must have been told by Ms Hutcheson that it was optional. The District Judge clearly proceeded on that basis as she was entitled, indeed bound to do. She also found that the Harrisons had taken out several PPI policies before this one, expected there to be one here and paid no particular attention to the information they received.

19. Under the PPI the Harrisons each had life cover up to a maximum of £75,000. Then, Mr (but not Mrs) Harrison had disability benefits which would commence 45 days after the start of disability which gave payment protection for the loan up to a maximum of 24 months for

any one claim and 36 months in total. Redundancy benefits were 12 and 24 months respectively and started after 60 days' unemployment. As noted above the PPI expired after 5 years although, unless the loans were discharged early, the monthly repayments in respect of the premium and interest would continue for the life of the main loan. Had that happened here the total cost of the PPI would have been just over £20,000 as was shown clearly in the loan agreement.

20. There was also unchallenged expert evidence from a Mr Cook that this form of PPI was very expensive when compared against policies with a monthly premium. The equivalent stand-alone cover available at the time would have cost the Harrisons £2,083.84 for the period for which they were covered under the PPI purchased. What they in fact paid was £8,445.86 more.

The Complaint

21. It was alleged that the Bank failed properly to ascertain the Harrisons' DAN because the Questionnaire was itself inadequate and there was no proper assessment of the suitability or otherwise of the PPI being offered. In particular, it was on any view too expensive and of insufficient length. As to cost, it was said that the Bank could and should have had regard to information it already had which showed that the Harrisons were now refinancing the 2003 loan and therefore might have some difficulty in meeting future PPI payments, or at least that the cost of a new PPI was relevant to their DAN, such that something should have been said to them about the high cost and/or this was a matter which should have featured in the Bank's overall assessment of suitability. This involved a breach of rules 4.3.2 (2) and/or 4.3.6 (2). As to length, the key point made was that the Questionnaire did not ask at all whether the Harrisons wanted PPI for the whole term of the main loan or only 5 years which was in fact the only period offered. This was a breach of rule 4.3.2 (1) and/or 4.3.6 (1).

The District Judge's Approach

22. The District Judge rejected these complaints. She found that the PPI was indeed expensive and for too short a period but nonetheless found that the Questionnaire had asked sufficient questions – see paragraph 24 of the judgment. In my view, however, the District Judge did not properly engage with the points being made about cost and length of policy. There is no real analysis of the issue as to whether further questions concerning cost should have been asked or whether in any event an assessment of suitability by reference to cost should have been undertaken by the Bank (it is common ground that there was no such assessment). Moreover the issue as to the need for the DAN to cover length was not dealt with. The overarching point as to the suitability of the PPI generally was dealt with on the basis that the Harrisons were made aware of all the key terms and it was up to them whether to purchase it or not. See paragraphs 28 and 29 of the judgment. But the fact that elements which were arguably unsuitable were clearly disclosed does not mean that there was no breach of the relevant rules which are concerned with what investigation should be made as to the DAN of the customer and whether a recommendation should be made. Accordingly the District Judge erred in her approach to these issues and they need to be examined afresh.

Further Analysis

23. While rule 4.3.6 (2) requires the Bank to have regard to the cost of the contract, this only applies where it is "relevant to the customer's demands and needs". This phrase must be given some meaning because it is clear that this sub-rule does not apply in every case. Here,

there was no specific information that cost was a relevant factor for the Harrisons. It might have been, had they said they had a particular budget which could not be exceeded but they did not. Nor do I think that rule 4.3.2 (1) required the intermediary to ask first off whether there were any particular cost constraints on the customer. The information to be sought here was to be germane to "the customer's requirements" which I take to be the particular risks which the customer needed covering in the light of the cover (if any) which he then had. In fact, the costs point was argued before me simply by reference to rule 4.3.2 (2). But as indicated above, I do not consider that the relevant details already available to the Bank by reason of its prior dealings with the Harrisons meant that it should have inferred therefrom that cost of the PPI was a real concern. Indeed there was no specific evidence from the Harrisons themselves to that effect. Accordingly I do not consider that 4.3.6 (2) was engaged. If it was not engaged I do not consider that rule 4.3.1 nonetheless required a consideration of cost or that the words "at least" in rule 4.3.6 entailed such a conclusion.

24. Even if rule 4.3.6 (2) had been engaged, it was argued before me (though not before the District Judge - but no point on this was taken by Mr Clark for the Claimants) that rule 4.3.7 (1) was relevant. This required the intermediary to compare the cost of the contact with other contracts on which it could provide advice where rule 4.3.6 (2) applied. But here, the Bank was advising only as to the suitability of the single product offered. It was not advising as to a number of different policies and was therefore in no position to make any comparisons. If the duty in 4.3.7 (1) did not apply, there was no meaningful assessment to be made. I agree with this submission. The essential reason why this PPI was found to be expensive was because there were other, much cheaper policies. I do not see how and to what extent the Bank could be obliged to advise on cost other than by reference to other available policies. That is a comparative exercise which the Bank was not obliged to undertake here.

25. Mr Clark conceded that there was no obligation on the Bank to undertake a comparative exercise but said that rule 4.3.7 (1) did not exhaustively define any duty in respect of cost that arose under rule 4.3.6 (2), if engaged. He said that if it were otherwise, the latter would be wholly redundant in cases of this kind where only a single product was offered, which were common across the industry in previous years. That may be so but the ICOB rules were not just dealing with this type of case and in any event I see nothing irrational or absurd in the operation of rule 4.3.6 (2) being so limited. Accordingly I consider that 4.3.7 (1) does exhaustively define the duty of the intermediary where rule 4.3.6 (2) is engaged.

26. Mr Clark submits that on any view (ie on a non-comparative basis) the PPI was expensive and disproportionate because its cost was equal to about 14% of the value of the main loan. It was also said that the benefits payable could never exceed the premium. That is not in fact correct because if the premium is taken as £10,200 as it should be, the maximum benefit payable could certainly exceed it as would the maximum payment on death. He also said that the rebate given on early cancellation of the policy was limited. He further suggested that the true cost of the policy must have been much less because of the size of the commission. However, for the reasons already given, the Bank here was under no duty by virtue of rule 4.3.6 (or indeed 4.3.1) to conclude or advise that the PPI was unsuitable on such non-comparative cost grounds.

27. Accordingly, on the question of cost, I would uphold the District Judge's conclusion albeit on different grounds.

28. I thus turn to the length of protection offered by the PPI, namely 5 years. The period required by the customer clearly forms part of the customer's demands and needs in my view. But there was no question in the Questionnaire designed to elicit that information specifically. Questions 3 and 4 might be said to have encompassed that question indirectly but if so it could only have been on the footing that the Harrisons were being asked whether they wanted the sickness or redundancy protection to apply in relation to <u>all</u> repayments ie not just the first 5 years' worth. Notwithstanding that, the personal recommendation was to the effect that a policy for five years only was needed. In truth, of course, no other recommendation would be made because the single policy offered was limited to 5 years.

29. The District Judge found that there was no breach here. Her essential reasoning was that the Harrisons knew that the policy was for 5 years anyway and accepted it on that basis and in actual fact the main loan was paid off within 5 years. While such matters may be relevant to the question of causation (see below) I cannot see that they are relevant to whether or not there was a breach of the ICOB rules. Accordingly the District Judge erred in this regard.

30. In my view there was a breach because:

(1) Under rule 4.3.2 (1) information as to the desired length should have been sought in the first place and it was not;

(2) The assessment required under rule 4.3.6 (1) entailed a consideration as to whether the level of cover provided was sufficient to cover the risks sought to be insured. "Level of cover" in my view includes length of cover. That being so the Bank was required to consider whether the level of cover available was sufficient. That reinforces the need to have sought the relevant information from the customer by that stage. As this was not done, there must have been a breach of this sub-rule as well. The only alternative analysis is to say that because of the terms of the recommendation the Bank did in fact consider whether 5 years was enough and concluded that it was. But on that analysis the Bank simply had no basis on which to come to that conclusion in which case there was a breach of the overarching duty under rule 4.3.1 (1) and/or the assessment duty under 4.3.6 (1). Indeed, as Ms Bala for the Bank accepted in argument, in truth the reference to 5 years was put in the recommendation simply to remind the customer that the PPI was of this limited length – but that cannot itself justify the advice that such a policy was suitable.

31. However, there are real difficulties of causation for the Harrisons here. For any viable claim for damages, it would have to be shown that if the Bank had not been in breach of duty, this PPI would not have been taken out. But there is no specific evidence about this at all. That is probably because this point was not at the forefront of the Harrisons' case before the District Judge. There is nothing specific about the 5 year term in either their written or oral evidence. Nor was the Bank's witness, Ms Johnston cross-examined about it. I am invited to infer that the Harrisons would have wanted the PPI for more than 5 years and would not have accepted a policy for only 5 years. But there is no evidence to this effect. I am invited to infer this from their answers to Questions 3 and 4 which could be read as assuming that the protection would last for the duration of the loan – see above. I see that but the other hand, it is pleaded in paragraph 5 (c) of the Reply that the Bank should have "appreciated [from the earlier agreement] that the Claimant would have to refinance during the term of the PPI and therefore not receive cover for the whole duration of a single premium PPI policy for 5

years." I accept that the context here was the Harrisons' response to points made in the Defence about PPI by way of monthly premiums as opposed to a single premium at the outset - but the fact remains that it is suggested that in truth the Harrisons could well be seeking to refinance within 5 years. And in fact that is exactly what happened as was noted by the District Judge. Moreover it is unquestionably the case that the Harrisons did in fact know at all material times prior to execution of the agreement that the PPI was for only 5 years. It is not suggested that they ever raised any point about this at the time and their own evidence does not suggest that they regarded it as inadequate. Mr Clark referred me to what Mr Harrison said in paragraph 11 of his WS to the effect that in relation to the earlier 2003 policy he would not have wished to purchase a policy lasting only 10 years in connection with a loan for 21 years – but no complaint was pursued about that or any other aspect of the earlier policy and I cannot safely infer anything from it in relation to the PPI in question. So it is far from clear and is certainly not proved by the Harrisons that if they had been asked specifically for how long they wanted the PPI or whether 5 years would be sufficient, they would have answered in the negative. For all of those reasons, their case on causation with regard to the issue of breach by reference to length of the PPI is not made out. Thus I reach the same conclusion as the District Judge but on a somewhat different basis.

32. A further point was taken on the appeal about the fact that life cover was recommended and provided to Mrs as well as Mr Harrison even though she had not specifically asked for it. However this was not something specifically raised in the Particulars of Claim or the subject of any specific evidence or argument at the trial and it is neither possible nor appropriate for this point to be raised and dealt with now.

33. Mr Clark made an overarching point about the inadequcacy of the Questionnaire and the personal recommendation upon the basis that in truth the recommendation would necessarily be given provided that cover was sought in the answers to Questions 3 and 4 and that Question 7 was answered in the negative. But this can only be dealt with by reference to specific shortcomings in terms of the seeking of the customers' DAN and the Bank's assessment. The shortcomings alleged here were cost and length and have been dealt with above. There is no further residual point in my view. Moreover the Bank's witness was not cross-examined on Question 7 beyond ascertaining that this was in effect the trigger for the recommendation.

34. The appeals therefore fails in respect of rule 4.3

ALLEGED BREACH OF RULE 2.3 – TAKING OF COMMISSION

35. The material rules here are as follows:

> "2.3.2 A firm must take reasonable steps to ensure that it ... does not
>
> (1) ... accept an inducement..
>
> if it is likely to conflict to a material extent with any duty that the firm owes to its customers in connection with an insurance mediation activity ...
>
> 2.3.7 (1) ICOB 2.3.2 R states that an inducement will only be considered unfair if it conflicts to a material extent with any duty that the firm owes to its customers. This means that the circumstances surrounding an inducement may determine whether or not it is unfair. It is a firm's responsibility to determine this.

2.3.8 (1) Inducements that operate at a distance from the sales process may not be unfair if they do not have an effect on the sales person's selling of a particular product ..."

36. For present purposes both parties proceeded on the basis that the duty which might be interfered with here was the duty under rule 4.3 as dealt with above. Rule 2.3.1 refers to overarching duties of fairness but they were not invoked by the Harrisons here.

37. There was an inducement taken here, namely the commission. However, the Bank argued that there was no likelihood of any material conflict essentially because any commission was not paid or attributed, in whole or in part, to the actual salesperson here ie Ms Hutcheson and there was no evidence that she even knew the extent of the commission. Moreover the very "scripted" approach to what she could say to customers meant that there was little or no prospect of her attempting to mislead them into buying the policy. Indeed it is common ground that there was no pressure or misrepresentation of any kind on her part towards the Harrisons. If necessary, the Bank relied upon rule 2.3.8 (1), namely that the commission here operated at a distance from the sales process which might not be unfair (for which read here "prohibited") if it did not have an effect on the sales person's selling of a particular product. The adoption of this system therefore meant that in any given case there was simply no room for a conflict to arise. While each salesperson had general targets to meet in terms of the sale of PPI this could not be said to equate to the taking of an inducement and in any event they were still bound by the scripted process.

38. Although in the section dealing with rule 2.3 the District Judge appears to have gone back to discussing the alleged breaches of rule 4.3, the core of her reasoning under 2.3 is at the end of paragraph 28 of the judgment: since Ms Hutcheson did not receive any of the commission and kept to her script and because a reasonable system had been set up to prevent a conflict, there was no breach of rule 2.3.

39. Mr Clark sought to argue against this by saying that the existence of a tightly-scripted process for the salesperson removed from the commission did not help the Bank here because in truth the whole sales process and in particular the Questionnaire and the assessment leading to the personal recommendation were flawed. I have not found this to be so save in respect of the length of the PPI. But the fact remains that there is still no room for manoeuvre on the part of the actual seller of the policy. What Mr Clark is really saying is that because there is a flawed sales process which must inevitably lead to breaches of rule 4.3 and because (one can assume) there will in every case be a commission payable to the Bank which may be sizeable, such incentives have caused it as an institution to adopt the flawed sales process across the board and thus there is a breach of rule 2.3. I do not accept this argument. What has to be looked at is the inducement in this particular case. For the reasons already given, it did not give rise to a likelihood of material conflict. If the sales process was flawed as a whole (which I did not find) that cannot be by reason of this particular inducement. There was simply no causal link between this particular inducement and the process actually used, nor any specific likelihood of conflict caused by its taking.

40. If there was a flawed sales process, while it may have been borne of a desire to do the minimum to comply with rule 4.3 (and on this hypothesis the Bank got it wrong in one respect) because the Bank naturally wants to sell PPI if it can, that is not sufficient to cause a breach of 2.3 in this particular case. On Mr Clarks' analysis the Bank was in truth always in breach of rule 2.3 whenever it made a sale because (a) commission was always payable

and (b) this is what led to the flawed sales process. But there was no evidence or cross-examination about this at all. It cannot be assumed in a vacuum. Indeed Mr Clark later accepted that it could not be said that any inducement would be bound to be likely to raise a conflict - if it were otherwise it would delegitimise the activities of independent financial advisers who typically earn their living from the taking of commissions. And because the salesperson here was under the control of the Bank and subject to a scripted process this is a far cry from the broker in *Yates v Nemo Personal Finance* 14 May 2010 (considered below) who was not subject to either of those constraints and had the opportunity to, and did, misrepresent the position. In truth, if there was a flawed process then (subject to proof of causation and loss) the remedy lies in damages under clause 4.3 and not 2.3 as well.

41. Mr Clark then argued that there was a likelihood of a conflict at least in this case because of the very size of the commission. But given the system in place the size of the commission could make no difference. And there was no evidence or cross-examination to the effect that this particular commission had any particular impact. Mr Clark argued that it did not matter what system was in place. The commission was so large that there was always likely to be a conflict. That does not follow and I do not accept it.

42. In my judgment and essentially for the reasons given succinctly by the District Judge there was no breach of rule 2.3 and no basis to interfere with her decision.

43. For the sake of completeness I also agree with the Bank that this argument would fail on causation in any event. Had the Bank not been in breach of duty (if it was) it would not have taken the inducement which is what rule 2.3 proscribes. What would flow from that on causation is not clear. Mr Clark frankly recognised that if this was the correct approach he would be in difficulties. He therefore put the case a different way arguing that absent the breach or to avoid being in breach, the Bank would have altered its role to a non-advisory one so that there would never have been a recommendation of this PPI which then would not have been purchased. But that is not the correct approach. The Bank here did adopt the advisory role and if it was not in breach of rule 2.3 the only permissible analysis for the purpose of causation is to assume that it in fact complied, which meant not taking the inducement.

NEGLIGENCE

44. A further ground of appeal is that the District Judge did not deal at all with a separate head of claim in common-law negligence. As pleaded in paragraphs 12 and 13 of the Amended Particulars of Claim the allegation was that the Bank assumed responsibility to take reasonable care in making the recommendation that it did and that it was in breach by reason of the matters pleaded in connection with ICOB rules 2.3 and 4.3. The Bank responds by saying, among other things, that while the District Judge did not deal with that point it was not in fact run at trial at all. Mr Clark accepts that it was not run as a separate or additional point though it was not abandoned. However he says that it assumes significance now because of the Bank's reliance (successful as I have found it to be) on rule 4.3.7 (1). If the Bank are entitled to run that argument now to avoid a breach of 4.3 in relation to cost, the Harrisons are entitled to rely on the pleaded claim in negligence were that to produce a different outcome on the same issue. I heard argument on the negligence point in this context but in my view it cannot assist the Harrisons. Given that ICOB prescribed a detailed code on how an intermediary in the position of the Bank should conduct itself when

purporting to give advice in respect of a single product ie whether to recommend it or not, I see no reason why any co-terminous duty of care should extend more widely. Moreover, the fundamental point raised by rule 4.3.7 (1) above was that the question of cost can only sensibly be dealt with by a comparison with other products. If (as here) the Bank cannot engage in such an exercise because of its very limited advisory role, I cannot see how it could be expected to advise more widely on the question of cost under a common-law duty of care. Its inability to make a comparison remains, as does the difficulty of imposing some sort of obligation to pronounce nonetheless upon whether the PPI was expensive according to some other standard.

45. To the extent that there was a co-terminous duty of care which was broken in relation to the question of the length of the PPI, the same problems of causation remain and any such claim would also, therefore, have failed.

46. Accordingly the appeal in respect of negligence must fail also. There was no need for the District Judge to have dealt with it since it was not in reality run before her and even if run now, it would not succeed.

UNFAIR RELATIONSHIP

47. The Harrisons claimed that there was an unfair relationship ("UR") under s140A of the 1974 Act in respect of the PPI transaction.

48. Section 140 A provides as follows:

> "(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement ... is unfair to the debtor because of one or more of the following-
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
>
> (2) In deciding whether to make a determination under this section the court shall have regard to all the matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)."

49. By s140B (9) once it is alleged that there was a UR it is for the creditor (here the Bank) to prove that the relationship was not unfair. In her paragraph 31 the District Judge expressly adverted to this and thus proceeded on that basis as do I.

50. While it would be wrong to describe the exercise undertaken by a Court in determining whether there was a UR as the exercise of a discretion, the very broad terms in which s140A is couched "provides the courts with maximum flexibility in considering unfairness" – see paragraph 3.12 of the OFT Guidance on Unfair Relationships, May 2008. The process involves an assessment of facts and the balancing and weighing of different factors which is classically an exercise for the Judge at first instance. For my part, save where it is quite plain that the Judge has failed to consider an obviously relevant matter or taken into account an obviously irrelevant factor, or proceeded on an erroneous view of the law, an appellate court

should be most reluctant to interfere. After all, UR claims are often made in relatively low value cases, frequently heard in the fast track, and it is desirable that they should be conducted simply and speedily.

51. It follows that save where clear issues of principle are involved, a decision as to UR in one particular case based on one particular set of facts is unlikely to be of any real assistance in another. That said, in deference to the arguments made before me on this appeal which were much more extensive than might usually be the case, I have considered and dealt with below two recent cases which involved PPI and UR allegations.

52. The Harrisons say that there are various factors which point to the existence of an unfair relationship. They are set out in paragraph 40 of Mr Clark's skeleton argument and should be taken cumulatively. They include the fact of the (large) commission, the limited length of the PPI and its cost. The District Judge rejected this claim. In doing so she accepted in paragraph 31 of her judgment that as a matter of law the existence of such a claim could not be ousted simply because of the existence of the ICOB regime and the separate remedies available thereunder.

53. Her overall reasoning is set out in paragraph 35. It is said that she erred in law first because she said there that the complaint seemed to be based not upon the relationship between the parties but because of the principal terms of the agreement. Taken by itself this does appear odd because s140A (1) (a) specifically contemplates that the terms of the agreement can form a ground of unfairness. But when the paragraph is read as a whole I do not see an error. What the District Judge was saying, correctly, was that the thrust of the Harrisons' case on UR was concerned with particular terms of the PPI in relation for example to cost. But these were features clearly explained, known of, and freely accepted by the Harrisons. That is a relevant factor under s140A.

54. The Harrisons then say that the absence of any pressure should not have been taken into account by the District Judge since the application of pressure was not alleged by them in the first place. But that does not mean that as part of all the circumstances the District Judge was not entitled to consider as relevant the fact that all the terms complained of were specifically known of and entered into freely. See s140A (2).

55. It is also said that she did not deal with the fact that the PPI had been positively recommended. That is so but in my view the fact that the Bank was recommending the PPI is of limited relevance. As the Harrisons knew the Bank could only offer one product and was not purporting to act as an independent adviser who would consider and compare a range of policies, like, for example, the broker in *Yates*. The Harrisons knew or must be taken to have known that if they wanted a consideration of other policies available they would need to do it themselves or consult a broker. And they had a choice as to whether or not to accept this PPI, a matter which is emphasised by the District Judge. Moreover there was no real evidence from the Harrisons as to the impact upon them of the recommendation. No doubt that was because at least at the witness statement stage the thrust of the Harrisons' evidence was that the Bank led them to believe that the PPI was mandatory – see paragraph 22 of Mr Harrison's witness statement – a point not maintained at trial. I also take into account the fact that there was no breach of the limited advisory duty here under ICOB save in respect of length of the PPI which I deal with below.

56. It is also said that the fact that the Bank was responsible for the terms of the PPI policy as well as the main loan was relevant but not taken into account. But this does not seem to me to add anything. Whether the Bank drafts the terms of the product or not, it is in any event selling it and if the terms give rise to unfairness it would be surprising if the fact that another party drafted the terms would make much difference.

57. However it is correct that the District Judge appears not to have dealt with the issue of the large commission and its non-disclosure to the Harrisons. That was a potentially significant factor. In addition, it is said that since the District Judge's decision there has been an important decision on unfair relationships in this context, namely *Yates* and had this been before her, the result might have been different. In those circumstances the appropriate approach is for me to consider the matter afresh.

58. I first need to refer to the case of *Yates*. Here HHJ Platts in a detailed judgment in the Manchester County Court found that there was a UR. The PPI there was taken out by customers who had been misled by the broker who was in receipt of a large undisclosed commission from the bank, that they had to take out the policy in order to obtain the loan. At paragraphs 37 to 46 the Judge set out six factors which pointed to an UR and then some further observations. I consider the Judge's approach in some detail because it was the only case cited to me where there has been an extensive analysis of a UR claim in the context of PPI.

59. In my judgment a very significant factor for HHJ Platts was the misrepresentation perpetrated by the independent broker who advised on the basis of considering various policies. That context is entirely missing from this case as it was in the very recent decision of HHJ Harris QC in *Vernalls v Black Horse Limited* 4 November 2010, where he dismissed a UR claim in connection with an expensive PPI policy. See in particular paragraph 18 thereof.

60. In *Yates* the Judge first relied upon the fact that the policy was very expensive. It is true that the PPI here was objectively expensive, ie by reference to other available products. I can well see how that may form part of a cumulative picture leading to unfairness where the customers have through the fault of the Bank (or a third party nonetheless attributed to the Bank as in *Yates*) had no real opportunity to apply their mind to questions of cost, for example, because they understood that they had no choice. But it is different where (as here) the Bank induced no such belief. The Harrisons must in truth have realised that the PPI was optional or if not, this was a mistaken impression of their own making. They should therefore be treated as having had a real opportunity to consider whether or not to take the PPI. In that context they could consider its cost, relative, for example, to the cost of the main loan. Here the figures were placed side by side. Moreover, although not determinative, the fact that there was no breach of rule 4.3 in relation to cost (for the reasons given above) counts against unfairness. On the question of length of the PPI Mr Clark says that if there was a breach of ICOB here then even if a claim thereunder fails on causation, it is relevant to a UR claim. I see that, but the reason why the claim failed on causation may equally be relevant. Here the Harrisons knew perfectly well that the policy ran only for 5 years because this was specifically drawn to their attention. But no complaint was made and it was not something addressed specifically in their evidence. That being so I do not see that the breach as to length "counts" for the purpose of the UR claim.

61. There is then the undisclosed commission. I accept that it was very large, being 87% of the premium. I also accept that if this had been disclosed to the Harrisons they may well have been interested to learn of it. Beyond that, how they may have reacted is a matter of speculation because, again, it was not something dealt with in their evidence. I accept that the non-disclosure of commission is something that would fall within s140A (1) (c) but the test is still whether there is unfairness as result. There may be, if the fact of the commission has led or might have led to some significant misrepresentation on the part of the adviser, as HHJ Platts found in *Yates*. But the system here did not allow for that. HHJ Platts referred to the fact of an undisclosed commission in his paragraph 38. However, as he made clear in his paragraph 39, the amount of commission was also important because it would have created an incentive to the broker to sell and create a conflict of interest. But in the case before me (a) I have already found that there was no likelihood of a conflict of interest arising and (b) the seller did not act improperly towards the customer. I note that in his paragraph 44 HHJ Platts emphasised that "the real problem here" was the behaviour of the broker in misleading the customers.

62. In his paragraph 40 HHJ Platts considered that the amount of commission, if disclosed, might affect the customer's assessment of whether they could accept the advice of the broker. I see that but in this case the exercise was more limited, as the Harrisons knew, because the Bank was only able to offer and advise on a single product. Moreover, for my part, if it is to be said that the amount of commission might have had or did have an effect on the mind of the customer there should be specific evidence from the customer on that point. As with any other allegation of non-disclosure the Court should know what the relevant party would have done or thought, had it known what it did not know. There would have been no difficulty in obtaining such evidence from the Harrisons here. In the context of a decision about an alleged UR this would be material evidence. In paragraph 41 he also said that disclosure of the commission may have affected whether or not the customers accepted the assertion that the PPI was compulsory. That feature is not present in this case.

63. In his paragraph 42 HHJ Platts took account of the fact that some reference to commissions could have been made in the calls with the customers. Possibly that could have been done in this case depending on what Ms Hutcheson actually knew, but by itself I do not see this as an important factor. In his paragraph 43 HHJ Platts also relied upon the fact that the customers were not told of their right to cancel the agreement. No such allegation is made in this case.

64. Accordingly although the District Judge did not deal with the question of non-disclosure of commission, this does not matter because it would not have caused a UR, whether taken by itself or together with the other features of this transaction. And there is nothing in *Yates* which in my judgment impels a different conclusion. Otherwise, there is no ground for interfering with the District Judge's conclusion with which I agree. Accordingly, the appeal fails in respect of the UR claim also.

CONCLUSION

65. For all the reasons given above the appeal is dismissed.